Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LAWRENCE COUNTY, MISSOURI, DAVID TATUM, DOUG SENEKER, BILL WEGRZYN, STEVE KAHR, ARTHUR OWENS, AND JOHN DOES 1-20, individually, and in their official capacities,

*Petitioners*,

v.

JOHNNY LEE WILSON,

*Respondent*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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October 27, 1998

62 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals has entered a decision that is in conflict with the explicit holding of, and policy in support of, this Court's opinion in *Heck v. Humphrey*, by holding that a Missouri gubernatorial pardon sufficiently "invalidates" a 42 U.S.C. §1983 litigant's prior criminal conviction.

2. Whether the Eighth Circuit Court of Appeals has entered a decision that is in conflict with a decision by the Missouri Supreme Court by holding that a pardon conferred in Missouri "expunges" a criminal conviction.

3. Whether the Eighth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court by holding that the law of the state from which a pardon emanates should not be considered in determining the legal effect of that pardon in the context of cases brought under 42 U.S.C. §1983.

## RULE 29.6 LIST OF ALL PARTIES

The only identified parties are as follows:

> Johnny Lee Wilson (respondent), Lawrence County, Missouri; David Tatum; Doug Seneker; Bill Wegrzyn; Steve Kahr; and Arthur Owens (petitioners).

In the underlying action, various unnamed law enforcement officers were included as defendants, designated as "John Doe, 1-20."

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**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

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Respondents hereby petition for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The judgment of the district court from which respondent appealed is reported as Wilson v. Lawrence County, 978 F. Supp. 915 (W.D. Mo. 1997). The opinion of the United States Court of Appeals for the Eighth Circuit has not been officially reported. However, it is identified as follows: Wilson v. Lawrence County, Appeal No. 97-4142 (U.S. Ct. App. Eighth Circuit). The judgment and the opinion are included in the Appendix.

## STATEMENT OF JURISDICTIONAL BASIS

The date the appeal for which a writ of certiorari is sought is August 17, 1998. The United States Court of Appeals for the Eighth Circuit entered its order granting stay of its mandate pending the filing of a petition for writ of certiorari on August 31, 1998. The statutory provision believed to confer upon the Supreme Court jurisdiction to review on this writ of certiorari the Eight Circuit's opinion is 28 U.S.C. § 1254.

## RULE 14(f) CITATIONS

42 U.S.C. § 1983 states, in pertinent part, as follows:

> "Every person who, under color of any statute, ordinance, regulation,

> custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

## STATEMENT OF THE CASE

In 1986, Cuba Pauline Martz was beaten, bound and gagged in her own home in Aurora, Missouri. Her home was then set afire, which resulted in her death.

In 1987, Johnnie Lee Wilson, after confessing to the crime, submitted an Alford plea and was convicted in Missouri State Court for the crime of first degree murder relative to Ms. Martz' death.

Thereafter, Wilson filed a motion to vacate the judgment of conviction, which was denied by the trial court. The trial court's denial of Wilson's motion to vacate was affirmed by both the Missouri Court of Appeals, Southern District, and the Missouri Supreme Court. Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991). Wilson continued to serve his sentence of life in prison without eligibility for probation or parole.

On September 29, 1995, the Governor of the State of Missouri, Mel Carnahan, issued a full pardon to Wilson.

Six months later, Wilson filed a complaint in the Federal District Court for the Western District of Missouri alleging, among other things, that his civil rights had been violated by law enforcement personnel and the county they served by virtue of Wilson's arrest, conviction and incarceration. Wilson's claim was filed under 42 U.S.C. § 1983 and state tort law.

The district court had jurisdiction to hear Wilson's complaint under 28 U.S.C. § 1331, 1343 and 1367(a).

In response to the complaint, respondents herein filed a motion to dismiss under Rule 12(b)(6), and in the alternative, a motion for summary judgment under Rule 56. In general, they argued to the district court that Wilson did not possess a cognizable 42 U.S.C. § 1983 claim because the gubernatorial pardon he received did not "invalidate" his conviction under Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The district court agreed, and entered judgment as a matter of law in their favor on September 16, 1997.

Wilson appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in an opinion filed August 17, 1998, reversed the judgment of the district court. Respondents filed a timely motion to stay the issuance of the Eighth Circuit's mandate pending the filing of a petition for

writ of certiorari with the United States Supreme Court.

**REASONS FOR GRANTING THE PETITION**

The Eighth Circuit Court of Appeals entered a decision in conflict with this Court's decision in Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 1296 L.Ed.2d 383 (1994). The Eighth Circuit's decision is in conflict with Heck in at least two respects: first, on the issue of whether actual "expungement" of a conviction by executive order is a necessary prerequisite to the maintenance of a § 1983 civil rights claim; and two, whether the policy expressed by Heck is honored when a recipient of a gubernatorial pardon is considered "guilty" in the eyes of the law.

In its decision, the Eighth Circuit purported to follow Heck by recognizing the fact that a claim is not cognizable under § 1983 where a judgment in favor of the plaintiff would necessarily imply the invalidity of the plaintiff's state conviction or sentence, unless the conviction or sentence has already been invalidated. Further, the court acknowledged that a plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

The Eighth Circuit, however, held that the gubernatorial pardon Wilson received

"expunged" his conviction within the meaning of Heck. In so holding, the Eighth Circuit essentially postulated that this Court did not mean what it said when it used the word "expunged." Heck clearly and explicitly states that in order for the executive order to be effective to remove the impediment to the maintenance of the § 1983 action, the order must "expunge" the conviction or sentence. Heck, 114 S.Ct. at 2372. In Missouri, however, a gubernatorial pardon does not necessarily "expunge" the conviction. While a Missouri pardon may end incarceration and restore all rights denied to felons, it does not nullify the judicial finding of guilt, close or expunge the judicial records, or relieve the pardoned felon from the consequences of a finding of guilt as opposed to conviction. State v. Bachman, 675 S.W.2d 41 (Mo.App. W.D. 1984).

In Bachman, a recipient of a gubernatorial pardon sought closure of the records of the underlying criminal proceeding against him. Bachman, 675 S.W.2d at 42. The court defined the difference between expunction and closure of records as follows:

> "While expunction requires the destruction of records, closure results in the records being closed to the public . . . [therefore] guilt is not obliterated . . . [and] the records, insofar as a pardon is concerned, must remain open." *Id.*

The result is that, in Missouri, a pardon alone does not order, direct or authorize the closure of records. *Id.* As indicated by the

court in Bachman, Missouri statutes provide only for closure, not expunction of criminal records regarding arrest (R.S.Mo. § 610.100), or regarding charges resulting in *nolle prosequi*, dismissal, not guilt verdicts or suspended imposition of sentence (R.S.Mo. § 610.105). However, such records are not to be destroyed (expunged), but are retained and available for various purposes under R.S.Mo. § 610.120.

As the court held in Bachman, while a pardon gives new effect to the criminal conviction of the defendant, it does not grant authority to close or expunge criminal records. Bachman, 675 S.W.2d at 52. Thus, the avenue of invalidation postulated by Heck, i.e., having the conviction or sentence "expunged" by executive order, is not satisfied simply by a Missouri gubernatorial pardon.

Apparently recognizing that under Missouri law a gubernatorial pardon does not literally "expunge" a conviction, the Eighth Circuit created a new definition of expungement: one that was not articulated by this Court in Heck v. Humphrey. The Eighth Circuit held that the term "expunge" has two different connotations; one literal, the other figurative. The court explained as follows:

> "It can mean '[t]he act of physically destroying information - including criminal records - in files, computers, or other depositories.' [citation omitted] Its more common meaning, however, is figurative: '[t]o destroy; blot out;

> obliterate; erase; efface designedly; strike out wholly." [citations omitted]

The Eighth Circuit reasoned that this Court must not have meant to employ the literal meaning of expungement, even though it expressly used that term, because none of the other methods of challenging the validity of the state conviction (direct appeal, state collateral proceedings, and federal habeas review) entails the literal destruction or "expungement" of the records of conviction.

Respondents fail to see the logic in the Eighth Circuit's reasoning in this regard, or how the Eighth Circuit's decision on this issue can be anything other than in conflict with the express language employed in the Heck decision. Simply because the other methods of challenging the validity of the state conviction do not require the expungement of the conviction does not mean that the Supreme Court failed to mean what it said when it used the word "expunge." Each method of challenging the validity of a state conviction, being different proceedings, is governed by different rules, procedures and requirements, and likewise, is treated differently by the laws of the states which provide those methods. It happens to be that, in Missouri, a gubernatorial pardon simply does not expunge a record of conviction. In essence, therefore, the Eighth Circuit has held that a § 1983 plaintiff's prior conviction is invalidated by an executive order that does not expunge the conviction or sentence - a holding that conflicts with the

express language of this Court in Heck v. Humphrey.

The second manner in which the Eighth Circuit's decision is in conflict with the decision of Heck v. Humphrey relates to the Eighth Circuit's interpretation of the policy reasons underlying Heck and whether those policy reasons are honored by the Eighth Circuit's holding.

This Court, in Heck, articulated policy interests justifying the requirement that a § 1983 plaintiff must prove that his prior conviction or sentence has been invalidated in order to proceed on such a claim. The court emphasized the importance of finality and consistency, principles which are protected when § 1983 claimants are prevented from challenging the validity of their outstanding criminal judgments, and preserved if the prior criminal judgment is no longer valid, thereby removing the danger of inconsistency in the event a § 1983 plaintiff is successful. In short, this Court held that a district court considering a § 1983 claim must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction. If it does, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction has been invalidated.

In the instant case, and as will be discussed below, a Missouri gubernatorial pardon does not necessarily imply the invalidity of the conviction. In fact, a pardoned convict remains guilty in the eyes of Missouri law, even though he may be relieved of the consequences of his conviction.

Therefore, Wilson's maintenance of his civil rights action is inconsistent with the fact that he is still considered guilty of the offense he committed, despite his pardon. Clearly, if a person considered to be "guilty" is allowed to successfully pursue a § 1983 claim, then the policies of consistency and finality articulated in Heck are thwarted.

The Eighth Circuit's decision is in conflict with relevant holdings of the Supreme Court of the State of Missouri. Specifically, the Eighth Circuit's decision directly conflicts with Guastello v. Dept. of Liquor Control, 536 S.W.2d 21 (Mo. banc 1976), which held that a gubernatorial pardon removes the fact of conviction, but the guilt associated with the conviction remains.

In Missouri, the exercise of the power of pardon lies in the uncontrolled discretion of the Governor, and in determining whether to exercise the power, he is not restricted by rules of evidence. Whitaker v. State, 451 S.W.2d 11 (Mo. 1970). A governor may pardon a convicted criminal for any reason, whether it be for innocence, politics or publicity. It is precisely because of the "uncontrolled discretion" possessed by the Governor in granting pardons, and because of the inherent differences between that discretion and the orderly procedure of judicial processes, that the Missouri judiciary has placed limitations on the legal effect of such a pardon. In other words, while the Governor is at liberty to grant a pardon for any reason, the legal effect of that pardon is not so unlimited. Guastello v. Dept. of Liquor Control, *supra*.

In Missouri, a gubernatorial pardon preserves the guilt of the pardonee. Guastello, 536 S.W.2d at 23; State v. Bachman, 675 S.W.2d 41. A pardon is no more than the relieving of the punishment that the law otherwise would demand for the commission of a criminal offense. Bachman, 675 S.W.2d 41, at 49. The nature and legal effect of gubernatorial pardons in Missouri was exhaustively analyzed by the Missouri Court of Appeals in Damiano v. Burge, 481 S.W.2d 562 (Mo.App. 1972). Four years later, the Missouri Supreme adopted both the reasoning and the language of the Missouri Court of Appeals when it rendered its en banc opinion in Guastello, 536 S.W.2d at 23-24.

In Guastello, the Missouri Supreme Court held that the Supervisor of Liquor Control for the State of Missouri could not deny a person a liquor license on the grounds of the applicant having been convicted of violating the law relating to intoxicating liquor if the applicant had received a gubernatorial pardon for all such convictions. Guastello, 536 S.W.2d at 25. The court adopted the view that a pardon obliterated the fact of condition, but the guilt remained. *Id.* at 24.

The analysis in Guastello (relying on Damiano) began with the United States Supreme Court decision of Ex parte Garland, 4 Wal. 333, 18 L.Ed. 366 (1866), and culminated in the adoption of the views of Prof. Williston expressed in his 1915 Harvard Law Review article "Does a Pardon Blot out Guilt?", 24 Harvard Law Rev. 647 (1951). *Id.* at 23-24. The court recognized that, although a pardon removes all legal punishment for the offense,

if character is a necessary qualification and the commission of a crime would disqualify the pardonee, even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible. *Id.* at 24. Under Williston's analysis, as approved and adopted by the Missouri Supreme Court, there are three views of the effect of a pardon:

> "View #1 is that the conviction and guilt are wiped out and obliterated. Thus, it makes the offender as if he had not committed the offense in the first place.
>
> View #2 is that the fact of conviction is obliterated, but the guilt remains . . .
>
> View #3 is that neither the fact of conviction nor the guilt are obliterated - only the punishment. . . ."

Guastello, 436 S.W.2d at 23.

The Missouri Supreme Court expressly held:

> "We adopt view #2 as being the most compatible, of the three alternatives, with the power of an executive to pardon and the realities of life." *Id.* at 24.

The legal effect of a Missouri gubernatorial pardon does not rise to the level of invalidation required by the Supreme

Court in Heck. To hold otherwise would directly conflict with the stated policy in Heck to promote judicial consistency. If, as Guastello holds, a pardoned criminal is still guilty, then a successful § 1983 claim, which implies the absence of guilt, is directly contrary to that view. In order to insure consistency and be faithful to Heck, the pardon a § 1983 plaintiff receives must remove both the fact of conviction and the guilt. However, that result is only obtained under view number one, "that conviction and guilt are wiped out and obliterated" - a view that was specifically rejected by the Missouri Supreme Court in Guastello.

In its decision the Eighth Circuit essentially held that the pardon Wilson received obliterated his guilt. Because the Missouri Supreme Court has expressed the opposite view, the Eighth Circuit's decision is in conflict with that decision, thereby justifying review by this Court.

In its decision, the Eighth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Specifically, the Eighth Circuit has held that whether a gubernatorial pardon effectively invalidates a conviction for purposes of prosecuting a § 1983 claim is a matter of federal law rather than of state law. Specifically, the Eighth Circuit held that a review of the law of the state from which the pardon emanates regarding the effect of that pardon is not relevant. Respondents respectfully suggest that the holding of the Eighth Circuit presents not only a relatively novel, unsettled question of

federal law, but is, in fact, in conflict with what little federal law exists on the issue.

When the district court entered summary judgment in favor of respondents, it relied on Missouri law to inform it on the issue of whether a Missouri gubernatorial pardon invalidated Wilson's conviction in the context of his § 1983 claim. The Eighth Circuit, however, stated that the issue was one of federal law and did not require any consideration of state law.[1]

While there do not appear to be any decisions of this Court or of another U.S. Court of Appeals on the same matter, the Federal District Court for the Eastern District of Virginia has addressed this issue. In Snyder v. City of Alexandria, 870 F.Supp. 672 (E.D. Va. 1994), it was held that a federal court must examine state law to determine the effect that the state to a gubernatorial pardon in order to determine whether the invalidation requirement has been met in the context of a § 1983 claim. Snyder held as follows:

> "The question, therefore, is whether executive pardons or judicial expungement orders are also

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[1] The Eighth Circuit, in footnote 3 of its decision, did state that, even if it were necessary to resort to state law to inform its decision, Missouri law would hold that a gubernatorial pardon invalidated Wilson's conviction. As is discussed above, appellees believe the Eighth Circuit's decision in this regard is contrary with the decisions of the Missouri Supreme Court.

> appropriate means by which a wrongly convicted person can establish his innocence. Answering this question requires an examination of Virginia law regarding pardons and expunctions."

Snyder, 870 F.Supp. at 679.

Accordingly, the Eighth Circuit's decision underscores the fact that this issue is unsettled. The Eighth Circuit apparently takes the position that a pardon by a state governor is *ipso facto* sufficient to invalidate a prior conviction within the meaning of Heck v. Humphrey, regardless of the law of the state from which that pardon emanates. A federal district court has adopted precisely the opposite holding. As such, respondents urge this Court to resolve this important federal question.

Further, this Court's decision in Heck v. Humphrey begs the question of the degree to which federal district courts should examine state law to determine the efficacy of the invalidation mechanisms set forth by this Court. This Court's decision in Heck seems to contemplate that not all avenues for the invalidation of the conviction will be made available under state law. Specifically, Justice Scalia noted that a conviction could be "declared invalid by a state tribunal authorized to make such a determination." Heck, 114, S.Ct. at 2372 (emphasis added). In using such language, this Court seems to anticipate that this avenue (invalidation by a state tribunal) might not be available in all states, since some states may not have

tribunals that are authorized to declare a conviction invalid.

Likewise, not all states treat the legal effect of a gubernatorial pardon in the same way. In the instant case, a Missouri gubernatorial pardon does not "expunge" a conviction. If Heck is read literally, and Missouri law is followed, then Wilson's conviction was not expunged. On the other hand, if the Eighth Circuit's decision is upheld, then all gubernatorial pardons, regardless of the legal effect given to those pardons by the state from which the pardon emanates, will be sufficient to invalidate that conviction in the context of a § 1983 claim. Thus, the unresolved question is whether, and to what extent, a federal district court must consult state law regarding the effect of a gubernatorial pardon in determining whether that pardon satisfies the mandate of Heck that the executive order "expunges" the conviction.

* * * *

In summary, the decision of the court below is in conflict with this Court's precedent, the policy underlying adherence to certain restrictions faced by §1983 litigants, and with existing Missouri law. Further, the Eighth Circuit's decision raises a previously undecided question of federal law which should be resolved by this Court.

## CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 27, 1998

# APPENDICES

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

NO. 97-4142

JOHNNY LEE WILSON,

*Appellant,*

v.

LAWRENCE COUNTY, MISSOURI,
et al.,

*Appellees,*

The National Advisory
Group for Justice,

Amicus on Behalf of
the Appellant

Appeal from the United States
District Court for the
Western District of Missouri

Submitted: May 15, 1998
Filed: August 17, 1998

ORDER

Before BEAM, LOKEN, and MURPHY, Circuit Judges.

BEAM, Circuit Judge.

Johnny Lee Wilson appeals the district court's adverse grant of summary judgment in this action under 42 U.S.C. § 1983, which seeks damages from the defendants for wrongfully arresting and incarcerating Wilson in violation of his constitutional rights. We reverse and remand for trial.

## I. BACKGROUND

In 1986, county officials arrested Wilson, who is mentally retarded, in connection with the murder of an elderly woman. Wilson was charged with capital murder under Missouri law. In order to avoid the possibility of the death penalty, he submitted an *Alford* plea[1] to first-degree murder. Wilson was convicted and sentenced to life imprisonment without the possibility of probation or parole.

In September of 1995, after Wilson had spent more than nine years in prison, Missouri Governor Mel Carnahan granted him the following pardon:

> I, MEL CARNAHAN, GOVERNOR OF THE STATE OF MISSOURI, have had presented to me a request for the pardoning of Johnny Lee Wilson, who was on the 30th day of April, 1987, by a judgment of the Circuit Court

[1] With an *Alford* plea, the defendant pleads guilty and consents to the imposition of a sentence while still proclaiming his innocence of the charged offense. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970). The court is obliged to find "strong evidence of actual guilt" before accepting such a plea. *Id.*

> of Jasper County, sentenced for the crime of First Degree Murder. After examination of the application and the facts relevant thereto, and upon the recommendation of the Board of Probation and Parole, I hereby grant to Johnny Lee Wilson a full pardon from the above conviction. This pardon obliterates said conviction so that I hereby relieve Johnny Lee Wilson from the obligation to satisfy any part of the sentence for said conviction which may remain unsatisfied, restore to him all rights of citizenship forfeited by said conviction, and remove any legal disqualification, impediment or other legal disadvantage which may be a consequence of said conviction.

App. at 80. Governor Carnahan also issued an accompanying statement explaining the reasons for his decision to pardon Wilson:

> As a result of an intense investigation conducted by my office, I have decided to issue a pardon to Johnny Lee Wilson because it is clear he did not commit the crime for which he has been incarcerated.
>
> ....
>
> It is common for convicted criminals to make claims of innocence. In almost all of these cases, the claims of innocence are

false. However, in this case, it is clear that Johnny Lee Wilson's claim is true.

To meet my responsibilities under the Constitution, this office has conducted an exhaustive investigation into the facts of this case. We have spent literally hundreds of hours re-examining the evidence in this case. We have reviewed all the transcripts and re-interviewed the key witnesses including the prosecutor and law enforcement officials involved in this case.

....

From this investigation, it is clear that Johnny Lee Wilson's confession is false and inaccurate. Furthermore, there is no evidence to corroborate or substantiate it. Quite to the contrary, there is significant evidence to indicate that it is false.

It is evident that the only facts this mentally retarded man knew about this hideous crime were the facts given to him by investigators who felt pressure to solve the case quickly. And virtually all the information Wilson himself tried to offer about the crime--in response to the investigator's questions--was inaccurate and inconsistent with the known facts.

> In fact, the original motivation for Wilson's arrest has been removed. The person who originally accused Wilson of committing the crime has recanted his accusation and now admits that the statement he made to police was untrue.
>
> ....
>
> . . . [I]n the case of Johnny Lee Wilson, we have locked up an *innocent, retarded man who is not* guilty of the crime of which he was accused.

App. at 82-83.

Following his release from prison, Wilson filed this action against Lawrence County and various named and unnamed law enforcement officials. The complaint raised claims under state tort law as well as 42 U.S.C. § 1983, alleging that the defendants had "conducted a biased investigation by intimidating and coercing witnesses" and "provided information, knowing it was false and/or misleading or in reckless disregard for the truth or falsity of the information, to the prosecution and the court in an effort to obtain Wilson's conviction at any apparent cost, "resulting in Wilson's conviction and incarceration in violation of his rights. The defendants moved to dismiss Wilson's federal claim under Rule 12(b)(6) or, in the alternative, for summary judgment. The district court granted summary judgment in favor of the defendants on the section 1983 claims, and declined to exercise

supplemental jurisdiction over Wilson's remaining state law claims. Wilson appeals.

## II. DISCUSSION

We review the district court's grant of summary judgment de novo. *See Smith v. Jenkins*, 919 F.2d 90, 92 (8th Cir. 1990). Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). All facts and inferences are viewed in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The question before us is whether the defendants are entitled to judgment as a matter of law.

A claim is not cognizable under section 1983 where a judgment in favor of the plaintiff would necessarily imply invalidity of the plaintiff's state conviction or sentence, unless the conviction or sentence has already been invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994). The plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

The parties agree that a favorable resolution of at least some of Wilson's 1983 claims would imply that his conviction was

invalid.[2] Therefore, under *Heck*, he cannot maintain this 1983 action absent a showing that his conviction has been invalidated by some means independent of the instant proceeding. Wilson asserts that his conviction was "expunged by executive order" by virtue of his full pardon from the governor. The defendants disagree. The district court, relying on Missouri law, concluded that a person who is pardoned by the governor remains guilty in the eyes of the Missouri court and therefore cannot bring a 1983 claim for wrongful incarceration. In our view, however, the issue in this case is one of federal law.[3] *Cf. Smith v. Holtz*, 879 F.Supp. 435, 443 (M.D. Pa. 1995) (holding that the common law of malicious prosecution should

---

[2] We do not address the issue of which claims imply the invalidity of Wilson's conviction and which do not. Nor do we consider whether any of the claims may be time-barred. Those potential issues were not before the district court and are not advanced on appeal.

[3] Even if it were necessary to resort to state law to inform our decision on this federal question, we would find that a governor's pardon does invalidate a conviction in the State of Missouri. The Missouri Supreme Court determined the legal effect of a gubernatorial pardon in *Guastello v. Department of Liquor Control*, 536 S.W.2d 21 (Mo. 1976). In *Guastello*, the court adopted the view that, in Missouri, a full pardon "obliterate[s]" "the fact of conviction," "but the guilt remains." *Id.* at 23-24. The "guilt" to which the court referred was not the "legal guilt," but the "moral guilt," or the "moral character," of the pardonee. *Id.* at 23 & n.1. The Department of Liquor Control was not free to deny Guastello a liquor license based on his prior conviction, the court held, because that conviction was obliterated when the governor granted him a full pardon. *Id.* at 25. If, under the law of Missouri, a gubernatorial pardon has the effect of "obliterat[ing]" a state conviction, it can properly be said to "expunge" and "invalidate" that conviction as well.

not be read into 1983 beyond the boundaries of *Heck* because "we are here formulating a body of federal substantive law--determining the elements of a federally-enacted cause of action"). The relevant question is whether Wilson's pardon invalidated his conviction within the meaning of *Heck*. We find that it did.

Though *Heck* does not list an executive pardon among the ways a state conviction can be invalidated for purposes of 1983, it "certainly seem[s] to be within the reach of the Court's language." *Snyder v. City of Alexandria*, 870 F.Supp. 672, 686 (E.D. Va. 1994) (finding that a 1983 plaintiff's pardon for innocence falls within *Heck's* description of the ways a conviction can be invalidated). *Heck* expressly approves the method of "expunge[ment] by executive order." The term "expunge" has two different connotations. It can mean "[t]he act of physically destroying information--including criminal records--in files, computers, or other depositories."

Black's Law Dictionary 582 (6th ed. 1990). Its more common meaning, however, is figurative: "[t]o destroy; blot out; obliterate; erase; efface designedly; strike out wholly." *Id.*; *see also* The Random House Dictionary of the English Language 683 (2d ed. 1987) ("to strike or blot out; erase; obliterate").

None of the other authorized methods of challenging the validity of a state conviction--direct appeal, state collateral proceedings, and federal habeas review--all of which the Court mentioned in the same breath

as "expunge[ment] by executive order," entails the literal destruction, or "expungement" of the record of conviction. It is highly unlikely that the Court intended arbitrarily to impose that requirement in this one category of cases. Thus, we think the Court intended the figurative meaning of "expunge."

In this sense, Wilson's pardon did "expunge" his conviction "by executive order." Governor Carnahan, acting within his authority under the Missouri Constitution, *see* Mo. Const. Art. IV, Sec. 7, issued Wilson a full pardon, stating "it is clear [Wilson] did not commit the crime for which he has been incarcerated." The pardon states on its face that it "obliterates said conviction." Wilson's pardon is therefore an "executive order" that "expunged," "obliterated," and "invalidated" his conviction. *Heck* requires nothing more.

The district court determined that the requirements of *Heck* were designed, in part, to avoid the possibility of inconsistent outcomes based on the same transaction. Because Wilson was adjudicated guilty, the court reasoned that *Heck* prevents the inconsistency of allowing him to recover damages for his wrongful conviction. This is to turn *Heck* on its head. Any successful collateral attack on a conviction necessarily results in inconsistent outcomes based on the same transaction. *Heck* does not prevent this. In fact, *Heck* condones collateral proceedings as a mechanism for satisfying its mandates. A federal writ of habeas corpus does not reverse or void the state judgment of conviction. *See Rimmer v. Fayetteville Police Dep't*, 567 F.2d

273, 277 (4th Cir. 1977) (observing that "the state court judgment is neither reversed nor vacated" when a federal court issues a writ of habeas corpus); *Smith v. Spina*, 477 F.2d 1140, 1147 (3d Cir. 1973) (stating that a federal writ of habeas corpus "does not have the force and effect of voiding a conviction"). It does, however, by *Heck's* own terms, "invalidate" the conviction for purposes of bringing a section 1983 claim challenging that conviction. Indeed, the only way a state conviction could be "invalidated" without the consequence of inconsistent outcomes based on the same transaction is reversal on direct appeal. The invalidation requirement of *Heck* is not limited, however, to the direct appeal process.

The gist of *Heck* is that section 1983 is not an appropriate vehicle for attacking the validity of a state conviction. Wilson does not seek to put it to this improper use. He used the executive clemency process, which the Supreme Court has expressly approved, as the forum in which to challenge his criminal conviction. *See Herrera v. Collins*, 506 U.S. 390, 411-17 (1993). In *Herrera*, the Court described pardons as "provid[ing] the 'fail safe' in our criminal justice system," noting that "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.* at 415 (citations omitted). The present case is a prime example of the usefulness of the pardon process to vindicate the innocent, and it demonstrates that the Court's faith in the viability of executive clemency was not misplaced. Section 1983 rightly provides a

remedy to an innocent man whose constitutional rights have been violated by an erroneous conviction and wrongful nine-and-one-half-year incarceration.

We find that, by virtue of the pardon he received from Missouri's governor, Wilson's conviction was invalidated and "expunged by executive order" within the meaning of *Heck*. Accordingly, we reverse the district court's grant of summary judgment.

Because Wilson's federal claim is cognizable, the district court had no discretion to dismiss his state law claims, as they are so intertwined with his section 1983 claim that they form part of the same case or controversy. *See* 28 U.S.C. § 1367.

**III. CONCLUSION**

For the foregoing reasons, the district court's grant of summary judgment is reversed, Wilson's state law claims are reinstated, and the case is remanded for trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

**APPENDIX B**

JOHNNY LEE WILSON,

*Plaintiff.*

v.

LAWRENCE COUNTY, MISSOURI, et al.,

*Defendants,*

No. 96-5026-CV-SW-1.
United States District Court
W.D. Missouri,
Southwestern Division.

ORDER

WHIPPLE, District Judge

Pending before the Court are Defendants' nearly identical motions for dismissal under Federal Rule of Civil Procedure 12(b)(6) for Plaintiff Johnny Lee Wilson's failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment under Rule 56. Defendants seek dismissal or summary judgment on Wilson's action brought under 42 U.S.C. § 1983, which seeks money damages against the defendants for wrongfully arresting and incarcerating him in violation of his constitutional rights. For the reasons

stated below, Defendants' motions for summary judgment under Rule 56 are GRANTED.

## I. FACTUAL BACKGROUND

In 1987, Johnny Lee Wilson submitted an *Alford* plea (FN1) and was convicted in Missouri state court for first-degree murder. He was sentenced to life imprisonment without eligibility for probation or parole. On September 29, 1995, Governor Mel Carnahan issued a full pardon to Wilson. The pardon reads as follows:

> I, MEL CARNAHAN, GOVERNOR OF THE STATE OF MISSOURI, have had presented to me a request for the pardoning of Johnny Lee Wilson, who was on the 30th day of April, 1987, by a judgment of the Circuit Court of Jasper County, sentenced for the crime of First Degree Murder. After examination of the application and the facts relevant thereto, and upon the recommendation of the Board of Probation and Parole, I hereby grant to Johnny Lee Wilson a full pardon from the above conviction. This pardon obliterates said conviction so that I hereby relieve Johnny Lee Wilson from the obligation to satisfy any part of the sentence for said conviction which may remain unsatisfied, restore to him all rights of citizenship forfeited by said conviction, and remove any legal disqualification, impediment or other legal disadvantage which may be a consequence of said conviction.

Pl.'s Ex. A. On the same day, Governor Carnahan also issued a separate statement, explaining his reasons for the pardon:

> [J]ust as I have a responsibility to Missourians to see that criminals are placed behind bars, I also have a responsibility to see that an innocent person is not punished for a crime he did not commit.
>
> It is common for convicted criminals to make claims of innocence. In almost all of these cases, the claims of innocence are false. However, in this case, it is clear that Johnny Lee Wilson's claim is true.
>
> To meet my responsibilities under the [Missouri] Constitution, this office has conducted an exhaustive investigation into the facts of this case. We have spent literally hundreds of hours re-examining the evidence in this case. We have reviewed all the transcripts and re-interviewed the key witnesses including the prosecutor and law enforcement officials involved in this case.
>
> . . . . .
>
> From this investigation, it is clear that Johnny Lee Wilson's confession is false and inaccurate. Furthermore, there is no evidence to corroborate or substantiate it. Quite to the contrary, there is significant evidence to indicate that it is false.

It is evident that the only facts this mentally retarded man knew about this hideous crime were the facts given to him by investigators who felt pressure to solve the case quickly. And virtually all the information Wilson himself tried to offer about the crime--in response to the investigators' questions--was inaccurate and inconsistent with the known facts.

In fact, the original motivation for Wilson's arrest has been removed. The person who originally accused Wilson of committing the crime has recanted his accusation and now admits that the statement he made to the police was untrue.

As long as I am governor, we will strive to lock away violent criminals so they won't be in our schools and won't be in our neighborhoods.

But in the case of Johnny Lee Wilson, we have locked up an *innocent, retarded man who is not* guilty of the crime of which he was accused.

Therefore, as governor of the State of Missouri, I am issuing a pardon to Johnny Lee Wilson.

In addition to the recommendation from my Chief Counsel, the Probation and Parole Board has also recommended that I take this action.

Pl.'s Ex. B, Statement from Governor Carnahan Re: Johnny Lee Wilson (Sept. 29, 1995).

Following his pardon, Wilson was released from confinement. Six months later, Wilson filed this action against Defendant Lawrence County and various named and unnamed law enforcement officers for having "conducted a biased investigation by intimidating and coercing witnesses and by preparing investigative reports which were false and misleading or prepared in reckless disregard for the truth," "provid[ing] information, knowing it was false and misleading or prepared in reckless disregard for the truth or falsity of the information, to the prosecution and the court in an effort to obtain Wilson's conviction at any apparent cost while concealing their own wrongful acts and omissions," all of which resulted in Wilson's submission of an *Alford* plea to avoid the death penalty and his subsequent conviction and imprisonment. Compl. at 2. Based on the defendants' alleged wrongful conduct, Wilson filed claims under 42 U.S.C. § 1983 and state tort law. Defendants' motions attack only the federal claim under § 1983, not the state claims.

## II. STANDARD FOR SUMMARY JUDGMENT

Defendants move for dismissal under Rule 12(b)(6) or, in the alternative, for summary judgment under Rule 56. A court must treat a party's Rule 12(b)(6) motion as a motion for summary judgment under Rule 56 when the parties present matters outside the pleadings. *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992). Most courts view "matters outside the pleading" as including any written or oral evidence in support of or in opposition to the

pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings. *Id.* A court must give the parties adequate notice of its intent to convert a Rule 12(b)(6) motion into a Rule 56 motion for summary judgment and an opportunity to provide further materials unless the nonmoving party had an adequate opportunity to respond to the motion and material facts were neither disputed nor missing from the record. *Id.* In this case, the Court relied on Wilson's materials that he offered outside the pleadings. Consequently, the Court will respond to Defendants' arguments as arguments for summary judgment. All parties had adequate notice that Defendants' motion would be treated as a motion for summary judgment and had an opportunity to respond because Defendant submitted alternative motions to the Court--one for dismissal under Rule 12(b)(6) and one for summary judgment under Rule 56. Additionally, the parties agree to not dispute the material facts of the case.

Summary judgment is appropriate under Rule 56 if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554-55, 91 L.Ed.2d 265 (1986). The facts and inferences from those facts are viewed in the light most favorable to the nonmoving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-90, 106 S.Ct.

1348, 1355-58, 89 L.Ed.2d 538 (1986). In this case, the disputed issue is one solely of law.

III. 42 U.S.C. § 1983

Wilson's federal claim, alleging that Defendants violated his constitutional rights, is brought under 42 U.S.C. § 1983. Defendants argue that Wilson's claim is not cognizable under § 1983. An analysis of the language and judicial construction of § 1983 is essential to resolve the dispute.

In relevant part, § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

The plain language of § 1983 authorizes plaintiffs to bring any claims against state actors for violation of any federal law. It does not expressly limit the type of federal claim that a plaintiff is authorized to bring.

The United States Supreme Court, however, has read § 1983 in relation to other civil rights statutes and has concluded that some claims are not cognizable under § 1983. For example, in *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the United States Supreme Court held that the federal

habeas corpus statute, 28 U.S.C. § 2254, is the exclusive remedy for a state prisoner to challenge the fact or duration of his confinement. *See Preiser*, 411 U.S. at 499, 93 S.Ct. at 1841. Such a claim for injunctive relief is not cognizable under § 1983. *Id.*

Following *Preiser*, the Supreme Court again limited the realm of prisoners' claims that are cognizable under § 1983. In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), Roy Heck was serving a term of imprisonment after having been convicted of manslaughter in state court. *Heck*, 512 U.S. at 478, 114 S.Ct. at 2368. While his appeal of the conviction was pending, Heck filed a lawsuit in federal district court under § 1983, naming a number of state officials as defendants. Heck alleged that the state officials' conduct during his arrest and trial violated the Constitution. He sought compensatory and punitive monetary damages, but not injunctive relief as had the claimant in *Preiser*. *Id.* Paralleling its conclusion in *Preiser*, the Supreme Court held that damages claims that call into question the lawfulness of a conviction or of confinement are not cognizable under § 1983. *See Heck*, 512 U.S. at 483, 114 S.Ct. at 2370 ("The issue with respect to monetary damages challenging conviction is ... whether the claim is cognizable under § 1983 at all. We conclude that it is not.")

In reaching its conclusion in *Heck*, the Supreme Court looked to the common law of torts, specifically to the common-law cause of action for malicious prosecution. *See Heck*,

512 U.S. at 484-86, 114 S.Ct. at 2372. In an action for malicious prosecution, the claimant must prove that the prior criminal proceeding terminated in his favor. *Id.* This requirement honors two important judicial policies: (1) finality of judgments and (2) the policy against the creation of two conflicting resolutions arising out of the same or identical transactions. *Id.* The Supreme Court found that those same policies undergirded its precedent that thwarted the expansion of collateral attacks on criminal judgments. *Id.* Therefore, based on the policies of consistency and finality, the Court concluded that civil tort actions are not appropriate vehicles for challenging the validity of an outstanding criminal judgment and, therefore, held that no such civil action was cognizable under § 1983. *Heck*, 512 U.S. at 486, 114 S.Ct. at 2372 ("We think that the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement ..."). Accordingly, the Supreme Court held that a § 1983 action seeking monetary relief for a wrongful conviction is cognizable only where the underlying conviction or sentence has been declared invalid in a proceeding independent of the § 1983 action. *See id.* The Court elaborated as follows:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983

> plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

*Heck*, 512 U.S. at 486-87, 114 S.Ct. at 2373.

In this case, the parties do not dispute that a judgment in favor of Wilson would necessarily imply the invalidity of his conviction. Instead, their arguments focus on whether Wilson's conviction has been declared invalid in a proceeding independent of his § 1983 action. Wilson contends that proof of his pardon is tantamount to proof that his "conviction or sentence has been ... expunged by executive order." Defendants disagree. The resolution of this dispute hinges on how Missouri law delimits the effect of a pardon. *See, e.g., Snyder v. City of Alexandria*, 870 F.Supp. 672, 679 (E.D.Va. 1994) ("The question, therefore, is whether executive pardons or judicial expungement orders are

also appropriate means by which a wrongly convicted person can establish innocence. Answering this question requires an examination of Virginia law regarding pardons and expungements."). If the Missouri Constitution's pardoning provision effectively empowers the governor to invalidate a conviction, then such an executive pardon "expunges" the conviction within the meaning of *Heck* and opens the door to a § 1983 action. A pardon will be deemed to "invalidate" or "expunge" a conviction, however, only if the effect of the pardon is to support the finality of judgments and to eliminate the risk of conflicting resolutions arising out of the same transaction -- the underlying policies which gave rise to the Supreme Court's ruling in *Heck*.

## IV. THE GOVERNOR'S PARDONING POWER

The governor's power to grant executive clemency stems from two provisions of the Missouri Constitution. First, Article IV, Section 1 states that "The supreme executive power shall be vested in the governor." Second, Article IV, Section 7 reads as follows:

> The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power

to pardon shall not include the power to parole.

The language of Article IV, Section 7 does not constrain the governor's pardoning power in any way relevant to Wilson's case. Other than the treason, impeachment, and parole limitations, Section 7 entrusts the governor with absolute discretion to grant pardons for reasons he deems proper. *See* Mo. Const. Art. IV, Sec. 7; *see also Whitaker v. State*, 451 S.W.2d 11, 15 (Mo.1970) (en banc) ("The exercise of the power of pardon lies in the uncontrolled discretion of the governor..."); *Guastello v. Dep't of Liquor Control*, 536 S.W.2d 21, 25 (Mo.1976) (en banc) (stating that the constitution authorizes the court only to determine the legal effect of the pardon, not to review the governor's decision to grant a pardon in the first place). Specifically, it does not prohibit the governor from pardoning a convict for innocence, as Governor Carnahan purported to do in his public statement explaining his reasoning for pardoning Wilson. Similarly, however, Article IV, Section 7 does not delineate the legal effect of a governor's pardon and does not state whether the legal effect varies depending on the governor's reasoning for granting the pardon. Section 7's silence on this matter leads the Court to look to the Missouri courts' interpretation of the effect of a gubernatorial pardon and to other provisions of the constitution which define the governor's powers and limitations.

A. Missouri Courts' Interpretation of the Scope of the Pardoning Power and the Effect of a Pardon

Neither the Eighth Circuit nor any Missouri court has had the opportunity to decide whether a pardon issued by a Missouri governor, in effect, invalidates a conviction within the meaning of *Heck v. Humphrey*. This issue presents a mixed question of state and federal law. The pardon's effect on a conviction is a question of state law. *See Snyder*, 870 F.Supp. at 679. On the other hand, federal law governs whether that pardon's effect, as interpreted by state law, is sufficient to invalidate a conviction within the meaning of *Heck*. Because state law is operative in resolving this issue, "[w]e must do our best to determine what state law is under the state decisions. .... [W]e must judicially 'estimate' what the [Missouri] Supreme Court would do if confronted with the same issue." *Heeney v. Miner*, 421 F.2d 434, 439 (8th Cir.1970) (citations omitted) (diversity jurisdiction). In making this prediction, the court "may consider relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data." *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir.1995) (diversity jurisdiction), *cert. denied*, --- U.S. ---, 116 S.Ct. 1268, 134 L.Ed.2d 215 (1996).

Although no courts interpreting Missouri law have directly addressed the *Heck v. Humphrey* issue, they have interpreted the effect of a gubernatorial pardon in other contexts. For example, in *Guastello v. Department of Liquor*

*Control*, 536 S.W.2d 21 (Mo.1976) (en banc), the Missouri statute governing liquor licenses listed factors which disqualified an applicant for a license: (1) lack of good moral character and (2) a conviction under a liquor law. *Id.* at 22. Joseph Guastello had been convicted under a liquor law but the governor had pardoned him. Nonetheless, the Supervisor of Liquor Control of Missouri denied Guastello's application for a license. The parties stipulated that the Supervisor's denial of the license was based solely on the conviction, not lack of good moral character. *Id.* Consequently, the Missouri Supreme Court set out to determine whether a gubernatorial pardon, issued under Article IV, Section 7, had the effect of restoring the claimant's ability to attain a liquor license. To resolve the issue, the court noted that three views exist relating to the effect of a pardon: (1) that conviction and guilt are both wiped out and obliterated; (2) that the fact of conviction is obliterated but the guilt remains; and (3) that neither the fact of conviction nor the guilt are obliterated -- only the punishment. *Id.* at 23. The court adopted the second view: "[W]e adopt View #2 as being the most compatible, of the three alternatives, with the power of an executive to pardon and the realities of life." *Id.* at 24. Because the Supervisor did not base his denial of Guastello's application on lack of good moral character, the fact that Guastello's guilt remained was immaterial. Therefore, the court held that the governor's pardon restored Guastello's eligibility to apply for a liquor license because it obliterated the conviction. *See id.*

Accordingly, under Missouri law, a governor is empowered to grant a pardon for any reason, including for innocence, if he chooses. *See Guastello*, 536 S.W.2d at 25 (stating that the constitution authorizes the court to determine only the legal effect of the pardon, not to review the governor's decision to grant a pardon). However, the effect of the pardon -- over which the governor has no control -- is to obliterate the conviction while leaving the guilt intact. *Id.* at 24.

The Missouri Supreme Court's judgment that a gubernatorial pardon leaves an individual's guilt intact excludes such a pardon from operating as an executive order expunging the conviction within the meaning of *Heck v. Humphrey*. As noted above, the United States Supreme Court's ruling that § 1983 civil tort actions are not appropriate vehicles for challenging the validity of an outstanding criminal judgment was rooted in the policies of consistency and finality. These policies are not served when a guilty person--although freed of his conviction--is authorized to file an action seeking monetary relief from state officials for contributing to his conviction and imprisonment. If the plaintiff won the lawsuit, an inconsistent outcome based on the same transaction would result. It is inconsistent to hold that a person who has been--and remains--adjudicated guilty of a crime may nonetheless recover damages for his wrongful conviction. Thus, because a pardon under a Missouri law does not free the individual from the adjudicated guilt, the pardon does not invalidate the conviction within the meaning of *Heck v. Humphrey*.

Wilson argues, however, that a pardon for innocence has a different effect than a pardon for other reasons. He argues that a Missouri court, if faced with the issue, would hold that a pardon for innocence invalidates a conviction within the meaning of *Heck v. Humphrey*. Although the effect of the pardon is a question of state law, the question of whether a pardon invalidates a conviction within the meaning of *Heck v. Humphrey* is a question of federal law. Thus, what Wilson must be arguing is that a pardon for innocence has the effect of View #1, described above: that conviction and guilt are both wiped out and obliterated. *See Guastello*, 536 S.W.2d at 23. This is the only view by which a pardon would invalidate a conviction within the meaning of *Heck v. Humphrey* because it is the only view that overcomes the problem of inconsistency of outcomes. However, Wilson offers only minimal support for his argument.

Wilson relies heavily on *State v. Jacobson*, 348 Mo. 258, 152 S.W.2d 1061 (1941), apparently the only case in which the Missouri Supreme Court arguably relied on some distinction between pardons for innocence and pardons for other reasons or no express reason. In that case, A.R. Jacobson desired to pursue the direct appeal of his conviction even though the governor had already pardoned him. The deed of pardon expressly stated that the governor was "convinced that this man is not guilty." *Jacobson*, 152 S.W.2d at 1064. The State moved to dismiss Jacobson's appeal as moot because, by accepting the pardon, he had admitted his guilt and thereby waived his rights on appeal. The court permitted Jacobson to pursue his appeal, holding that,

because the governor had expressly pardoned Jacobson for innocence, Jacobson's acceptance of the pardon did not necessarily imply a confession of guilt. *Id.* at 1064.

For a number of reasons, Jacobson is not persuasive to show that a Missouri court would hold that Governor Carnahan's pardon and related official statement had the effect described in View #1--that of wiping out and obliterating both Wilson's conviction and his guilt. In fact, the Court finds that *Jacobson* undermines Wilson's argument and supports the Court's conclusion that a Missouri court would espouse, View #2 even if a governor explicitly opined that the pardoned person was innocent.

First, Jacobson's pardon materially differed from Wilson's. In *Jacobson*, the deed of pardon issued by the governor expressly stated that the governor was convinced that Jacobson was innocent. In this case, Governor Carnahan issued a separate statement, apparently designed to promote community acceptance of his decision, to state that he believed Wilson was innocent. The statement of innocence was not contained in the deed of pardon itself. The fact that the governor omitted his opinion of innocence from the deed of pardon could lead a court to find that the opinion is inconsequential. *Cf., e.g., People v. Chiappa*, 53 Ill.App.3d 639, 11 Ill.Dec. 317, 318, 368 N.E.2d 925, 926 (1977) (indicating that only when the deed of pardon itself states that the pardon is for innocence will the convict be absolved of guilt and permitted to proceed with a direct appeal of his conviction) (citing *State v. Jacobson*).

Second, even if the omission were immaterial, there is little indication that the Missouri Supreme Court would today draw any distinctions among pardons based on the governor's opinion that an applicant is innocent. The Court is not convinced that the Missouri Supreme Court, if faced with the issue today, would limit *Jacobson* to instances in which the governor expressly stated that he believed that the applicant was innocent. The court in *Jacobson* explicitly declared that it "need not pause to determine the legal effect" of the governor's stated belief that Jacobson was innocent:

> The instrument evidencing the pardon issued by the Governor ... recites on its face that it was granted 'Upon the attached recommendation of the Board of Probation and Parole, *and because of the fact that I am convinced that this man is not guilty.*' (Italics ours). We need not pause to determine the legal effect of the italicized language. (FN2). It is sufficient to say it would be harsh and ironical to imply that a confession of guilt from the fact of acceptance of such a pardon.

*Jacobson*, 152 S.W.2d at 1064. Consequently, it is plausible that the Missouri Supreme Court would permit an individual whom the governor pardoned for no express reason to pursue the direct appeal of his conviction. Additionally, the court plainly did not conclude that the governor's language had the legal effect of obliterating both the conviction and the guilt. Thus, *Jacobson* is not a strong basis for arguing that the

Missouri Supreme Court would hold today that a pardon for innocence wipes out both the conviction and the guilt.

Third, and most importantly, the fact that the Missouri Supreme Court would distinguish a pardon for innocence to permit the claimant to appeal his conviction militates against Wilson's argument that a pardon for innocence obliterates both his conviction and his guilt. If a pardon for innocence obliterated both the conviction and the guilt, the pardon would have operated as an acquittal from the previous conviction and rendered Jacobson's appeal moot. The court did not find the appeal moot. Instead, it recognized that not all pardons are admissions of guilt and that, therefore, a claimant pardoned for innocence is not behaving inconsistently when he seeks an appeal to legally obliterate the guilt. In short, the court found that a convict's adjudicated guilt remains despite a pardon for innocence. Accordingly, contrary to Wilson's argument, *Jacobson* actually persuades the Court that a Missouri court would not hold that a pardon for innocence has the effect of obliterating both the conviction and the guilt. Consequently, the Court concludes that View #2, adopted in *Guastello* defines the effect of a gubernatorial pardon, even if granted based on a finding of innocence. This conclusion leads inevitably to the judgment that, under Missouri law, a gubernatorial pardon does not invalidate a conviction within the meaning of *Heck v. Humphrey* because it does not erase the pardoned person's guilt and, therefore, does not overcome the problem of inconsistency of outcomes. *But see Snyder*, 870 F.Supp. at 685-86 (holding that a

gubernatorial pardon under Virginia law obliterated the conviction and, therefore, invalidated the conviction within the meaning of *Heck v. Humphrey*).

B. Separation of Powers

Although the court in Guastello did not expressly invoke Missouri's constitutional provision apportioning governmental authority among the three branches, that provision and Missouri cases interpreting it strongly supports the court's conclusion that, "View #2 [is] ... the most compatible, of the three alternatives, with the power of an executive to pardon ..." *Guastello*, 536 S.W.2d at 24. Missouri's provision for separation of powers is found at Article II, Section 1 of the Missouri constitution. It reads as follows:

> The powers of government shall be divided onto three distinct departments--the legislative, executive, and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances this Constitution expressly directed or permitted.

Further, Article V, Section 1 states that the judicial power shall be vested in the courts. Under Missouri law, the quintessential power of the judiciary is the power to make final determinations of questions of law. *Asbury v. Lombardi*, 846

S.W.2d 196, 199-200 (Mo.1993) (en banc). This power is non-delegable and rests exclusively with the judiciary. *Id.* Thus, while legislative or executive bodies may exercise quasi-judicial decision-making, final judicial review of those decisions remains constitutionally mandated. *Id.*

A conclusion that a governor's pardon eliminates both the fact of the conviction and the adjudicated guilt would leave no remnant of the previous conviction. Accordingly, under the pardoning provision, the governor, in effect, would be empowered to make a final determination of a question of law--the guilt or innocence of an individual within Missouri's legal system. The pardon would obliterate the court's final judgment of guilt. The power of making final determinations of questions of law, however, cannot be delegated and remains exclusively with the court. Consequently, if faced with the issue, the Missouri Supreme Court would likely conclude that the obliteration of the court's judgment would violate Missouri's constitutional provision of separation of powers.

Neither the separation of powers provision nor the provision establishing the pardoning power, however, prevents the governor from gathering evidence in a case and satisfying himself that the candidate is innocent of the crime for which the court convicted him. The governor's evidence-gathering and decision, however, do not comply with any of the procedural rules constraining the courts. *See Whitaker v. State*, 451 S.W.2d 11, 15 (Mo.1970) (stating that the power of pardon is not

restricted by the rules of evidence). Thus, the governor's judgment is different in kind than the court's adjudication. In a court proceeding, the fact-finder, basing its judgment only on admissible evidence, determines whether the prosecutor in a criminal case proved his case beyond a reasonable doubt. The governor is constrained by no rules of evidence and no standards of proof. Under both the state and federal legal system, criminal defendants have a constitutional right to a fair process, not to justice in the form of an objectively right outcome nor to mercy. *See Michael H. v. Gerald D.*, 491 U.S. 110, 147, 109 S.Ct. 2333, 2354, 105 L.Ed.2d 91 (1989) ("The point of procedural due process is to give the litigant a fair chance at prevailing, not to ensure a particular substantive outcome."). The pardoning power provides a safety-valve for the flaws in the court system. The governor may ignore exclusionary rules and may grant mercy or demand justice. Missouri courts have consistently recognized that a pardon is an act of mercy or justice, but is not an adjudication. *See e.g., Jacobson*, 152 S.W.2d at 1064 (indicating that a pardon may be an act of mercy or of justice but that it is not sufficient to remove the adjudicated guilt); *Whitaker*, 451 S.W.2d at 15 (stating that, even though an official may gather evidence to convince himself that there was no guilt or that mistakes were made, a pardon "it is not a corrective judicial procedure to remedy a wrong" because a pardon does not involve a judicial process); *Lime v. Blagg*, 345 Mo. 1, 131 S.W.2d 583, 585 (1939) (en banc) (stating that a pardon is an act of grace); *State ex rel. Olive v. Hunt*, 247 S.W.2d 969, 973

(Mo.1952) (en banc) (stating that a pardon is conceived in mercy and is said to be in derogation of law). This safety-valve, however, cannot supplant the court's judgment without violating Missouri's provision for separation of powers.

Notably, however, the separation of powers provision, Article II, Section 1, permits encroachment by one branch into the functions of the other if the constitution elsewhere expressly directs or permits it. *See* Mo. Const., Art. II, Sec. 1. Arguably, the pardoning provision could be construed as providing an exception to the strict division of powers. The Missouri courts, however, have not interpreted the pardoning provision in this way. *Guastello's* adoption of View #2 -- the view that the court found the most compatible with the power of an executive to pardon--leaves the pardoned person's adjudicated guilt intact. In other words, it maintains a remnant of the court's judgment while still recognizing the governor's power to pardon. This holding balances the governor's exclusive power to pardon with the court's exclusive power to adjudicate guilt. Thus, the holding plainly suggests that the pardoning provision must operate consistently with the separation of powers' provision, not in derogation of it.

In sum, the Missouri Supreme Court would likely hold that Missouri's constitutional provision mandating separation of powers prohibits the governor from completely obliterating the court's judgment of guilt. In other words, the Missouri Constitution forbids View #1. Thus, a pardoned person

remains guilty in the eyes of the court which adjudicated that guilt. The court's judgment is not invalidated. Under the *Heck v. Humphrey* standard, this remaining adjudicated-guilt prevents a pardoned person from bringing a § 1983 suit for wrongful conviction because it would risk an inconsistent outcome in which a guilty litigant obtains money damages for his wrongful conviction. (FN3)

## V. SUPPLEMENTAL STATE LAW CLAIMS

Pursuant to 28 U.S.C. § 1367, Wilson would like the Court to exercise supplemental jurisdiction over his two state claims: (1) malicious prosecution and (2) intentional infliction of emotional harm, Title 28 U.S.C. § 1367(c)(3), however, grants district courts discretion to decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3); *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 979 (8th Cir.1991). Accordingly, because no federal question remains under 42 U.S.C. § 1983 and because there is no independent basis for subject matter jurisdiction over the remaining state claims, the Court is inclined to dismiss them without prejudice, which will permit Wilson to re-file them in state court. However, the Court recognizes that Wilson might encounter a procedural obstacle to re-filing if the statute of limitations has expired on his state claims. Consequently, the Court will permit the parties to address whether the Court should decline to exercise supplemental jurisdiction and therefore dismiss the remaining state claims under Rule

12(h)(3) for lack of subject matter jurisdiction.

VI. ORDER

Based on the foregoing, it is hereby ORDERED that Defendants' motions for summary judgment on Plaintiff Johnny Lee Wilson's claim brought under 42 U.S.C. § 1983 is GRANTED. It is further

ORDERED that Johnny Lee Wilson shall show cause in writing within fifteen (15) days from the date of this Order why the Court should not dismiss his state claims under Rule 12(h)(3) for lack of subject matter jurisdiction. It is further

ORDERED that Defendants' shall respond to Wilson's submission within fifteen (15) days from the date of its filing.

/s/ J. Whipple

FN1. "An Alford plea allows a defendant to plead guilty and consent to imposition of a sentence even though he may continue to proclaim his innocence. In such circumstances, the court accepting the plea must determine that there is 'strong evidence of actual guilt.' *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970)." *Brownlow v. Groose*, 66 F.3d 997, 998 n. 2 (8th Cir.1995), *cert. denied*, --- U.S. ---, 116 S.Ct. 1049, 134 L.Ed.2d 194 (1996).

FN2. Despite the court's statement that it is not "determ[ing] [*sic*] the legal effect of the

italicized language," the court gives the language a legal effect: that of permitting a pardoned person to have an appeal which he might not otherwise have. Thus, the court's statement disavowing any judgment regarding the legal effect of the governor's stated belief of Jacobson's innocence is somewhat in tension with the court's holding that Jacobson could appeal his conviction. Reasonably read, the court's statement must mean that the court was not determining whether a governor's express belief in the individual's innocence has any legal effect other than the effect of removing an inconsistency--the inconsistency of pursuing an appeal despite an admission of guilt--which would otherwise prevent a pardoned person from pursing [*sic*] an appeal of his conviction.

FN3. The Court's earlier conclusion--under *Heck*-- and conclusion here--under the Missouri Constitution's provision for separation of powers--do not render a pardon ineffectual. First, the pardon removes some legal disqualifications which were a consequence of the conviction. In *Guastello*, for example, a gubernatorial pardon restored a person's eligibility for a liquor license. *Guastello*, 536 S.W.2d at 23-24. Second, the Court's interpretation of the Missouri Constitution does not prevent a pardoned person from ever pursuing a § 1983 claim. Instead, it requires a recognition of proper procedure. A § 1983 claim is not viable until the person pardoned under the Missouri Constitution succeeds on direct appeal. *See Jacobson*, 152 S.W.2d at 1064 (permitting a pardoned person to pursue a direct appeal of his conviction). Where, as here, a direct appeal is inappropriate, *see*

*Wilson v. State*, 813 S.W.2d 833, 848 (Mo.1991) (en banc) (explaining why direct appeal is inappropriate), Wilson could have collaterally attacked his conviction under Missouri's habeas corpus procedure or could have moved to withdraw his guilty plea instead of applying for a pardon. *See id.* (advising Wilson to petition for a writ of habeas corpus, to move to withdraw his guilty plea, or to apply for a pardon). If he were successful in either pursuit, his § 1983 claim would have been viable. *Heck*, 512 U.S. at 486-87, 114 S.Ct. at 2373 (stating that a § 1983 claim is viable where a conviction is declared invalid by a state tribunal authorized to make such determination). Instead, Wilson chose to apply for a pardon, which is not an appropriate proceeding to invalidate his conviction for purposes of § 1983.